

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

*PLAN FOR THE ADEQUATE
REPRESENTATION OF DEFENDANTS
PURSUANT TO THE
CRIMINAL JUSTICE ACT (CJA)*

CJA PLAN

FEBRUARY 1, 2003

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

CRIMINAL JUSTICE ACT PLAN

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I. AUTHORITY

Pursuant to the Criminal Justice Act (CJA) of 1964, as amended, Section 3006A of Title 18, United States Code, and the *Guidelines for the Administration of the Criminal Justice Act and Related Statutes*, Volume VII, *Guide to Judiciary Policies and Procedures* (CJA Guidelines), the judges of the United States District Court for the District of New Hampshire, adopt this Plan for furnishing representation in federal court for any person financially unable to obtain adequate representation in accordance with the CJA.

II. STATEMENT OF POLICY

A. Objectives.

1. The objective of this Plan is to attain the ideal of equality before the law for all persons. Therefore, this Plan shall be administered so that those accused of crime, or otherwise eligible for services pursuant to the CJA, will not be deprived, because they are financially unable to pay for adequate representation, of any element of representation necessary to an adequate defense.
2. The further objective of this Plan is to particularize the requirements of the CJA, the Anti-Drug Abuse Act of 1988 (codified in part at Section 848(q) of Title 21, United States Code), and the CJA Guidelines in a way that meets the needs of this district.

B. Compliance.

1. The court, its clerk, the Federal Defender Organization, and private attorneys appointed under the CJA shall comply with the CJA Guidelines approved by the Judicial Conference of the United States and/or its Committee on Defender Services and with this Plan.
2. A copy of this Plan is posted on the court's web site and is available to each private attorney upon the attorney's designation as a member of the panel of private attorneys under the Criminal Justice Act (CJA Panel). The clerk shall maintain a current copy of the CJA Guidelines for the use of members of the CJA Panel and shall make known to such attorneys its availability.

C. Definitions.

"Representation" includes counsel, investigative, expert, and other services.

"Appointed attorney" includes private attorneys who have been appointed as provided herein, the federal defender, and staff attorneys of the Federal Defender Organization.

III. SUPERSESSION

This Plan supersedes all prior Criminal Justice Act Plans of this court.

IV. PROVISION OF REPRESENTATION

A. Circumstance.

- 1. Mandatory.** Representation **shall** be provided for any financially eligible person who:
 - a. is charged with a felony or with a Class A misdemeanor;
 - b. is a juvenile alleged to have committed an act of juvenile delinquency as defined in Section 5031 of Title 18, United States Code;
 - c. is charged with a violation of probation, or faces a change of a term or condition of probation (unless the modification sought is favorable to the probationer and the government has not objected to the proposed change);
 - d. is under arrest, when such representation is required by law;
 - e. is entitled to appointment of counsel in parole proceedings;
 - f. is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;
 - g. is subject to a mental condition hearing under Chapter 313 of Title 18, United States Code;
 - h. is in custody as a material witness;
 - i. is seeking to set aside or vacate a death sentence under Sections 2254 or 2255 of Title 28, United States Code (*See* LCrR 44.2);
 - j. is entitled to appointment of counsel in verification of consent proceedings pursuant to a transfer of an offender to or from the United States for the execution of a penal sentence under Section 4109 of Title 18, United States Code;

- k. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or
- l. faces loss of liberty in a case and federal law requires the appointment of counsel.

2. Discretionary. Whenever a judge or magistrate judge determines that the interests of justice so require, representation *may* be provided for any financially eligible person who:

- a. is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized;
- b. is seeking relief, other than to set aside or vacate a death sentence under Sections 2241, 2254, or 2255 of Title 28, United States Code;
- c. is charged with civil or criminal contempt who faces loss of liberty;
- d. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
- e. is proposed by the United States attorney for processing under a pretrial diversion program;
- f. is held for international extradition under Chapter 209 of Title 18, United States Code; or
- g. has been notified that he or she is a target of a grand jury investigation.

Representation may also be furnished for financially eligible persons in ancillary matters appropriate to the proceedings pursuant to subsection (c) of the CJA.

Representation under this Plan shall include counsel, investigative, expert, and other services necessary for an adequate defense. *See* Subsection (e) of the CJA.

B. When Counsel Shall Be Provided.

Counsel shall be provided to eligible persons as soon as feasible after they are taken into custody, when they appear before a magistrate judge or judge, when they are formally charged or notified of charges if formal charges are sealed, or when a magistrate judge or judge otherwise considers appointment of counsel appropriate under the CJA, whichever occurs earliest. Such appointment may be made retroactive to include any appropriate representation furnished prior to appointment.

The court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown. The court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

If at any stage of the proceedings, the court finds that the defendant becomes financially unable to pay counsel who had been retained, the court may appoint counsel to represent the defendant as the interests of justice may so dictate.

C. Number of Counsel.

Where the court determines that a case is extremely difficult or complex, it may appoint more than one attorney.

D. Eligibility for Representation.

1. **Factfinding.** The determination of eligibility for representation under the CJA is a judicial function to be performed by a judge or magistrate judge after making appropriate inquiries concerning the person's financial condition.

In determining whether the defendant is financially unable to obtain counsel, the court shall act only upon statements made by the defendant either (a) under oath in open court, or (b) by sworn affidavit. The personal appearance of the defendant is not required.

2. **Disclosure of Change in Eligibility.** If, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with the representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall advise the court.
3. **Reimbursement.** If at any time after the appointment of counsel, the court finds that the defendant is financially able to obtain counsel or to make partial payment for the representation, the court may terminate the appointment of counsel or authorize or direct payment, in an amount fixed by the court, to the clerk of court as provided in the CJA, as the interests of justice may dictate.

V. FEDERAL DEFENDER ORGANIZATION

A. Establishment.

1. The New Hampshire Branch Office of the Federal Defender Organization of the District of Massachusetts, previously established in this district pursuant to the provisions of the CJA, is hereby recognized as the Federal Defender Organization for this district.
2. The Federal Defender Organization shall be capable of providing legal services throughout the district and shall maintain an office in Concord, New Hampshire.

B. Supervision of Defender Organization. The federal defender shall be responsible for the supervision and management of the Federal Defender Organization.

VI. PRIVATE ATTORNEYS

A. CJA Panel.

1. **Establishment of CJA Panel.** The existing, previously established Panel of attorneys who are eligible and willing to be appointed to provide representation under the CJA is recognized.
2. **Ratio of Appointments.** Private attorneys from the CJA Panel shall be appointed in a substantial proportion of the cases in which the accused is determined to be financially eligible for representation under the CJA.
3. **Composition of CJA Panel.**
 - a. **Approval.** The court shall establish a panel of private attorneys who are eligible and willing to be appointed to provide representation under the Criminal Justice Act. The court shall approve attorneys for membership on the CJA Panel after receiving recommendations from the Panel Selection Committee (Committee), established pursuant to Section VI.B. of this Plan. Members of the CJA Panel shall serve at the pleasure of the court.
 - b. **Size.** The court shall not fix a numerical limit on the size of the CJA Panel. Certain education programs are a prerequisite for continuing membership. The size will be determined by the activity of the membership. In its annual review, the Committee will

analyze the size of the CJA Panel to be sure it is large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that CJA Panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work, and thereby provide a high quality of representation.

- c. **Eligibility.** Attorneys who serve on the CJA Panel must be members in good standing of the federal bar of this district and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Local Rules of this court, and the Sentencing Guidelines.

In addition, the attorney must:

- (a) in the twelve months prior to the date of application, attend a minimum of six hours of training or a continuing legal education program on federal criminal defense, at least three hours of which shall be devoted to the sentencing guidelines; said training programs to qualify subject to the approval of the Panel Selection Committee;
- (b) have professional liability insurance in the minimum amount of \$100,000/\$300,000; and
- (c) demonstrate a commitment to provide high quality representation to those individuals eligible for their services.

Subsection (b) of the CJA provides, in part, that:

Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.

However, when the magistrate judge or the district judge presiding over the case determines that the appointment of an attorney who is not a member of the CJA Panel is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting the appointment, the attorney

may be admitted to the CJA Panel *pro hac vice* and appointed to represent the CJA defendant. Consideration for preserving the integrity of the CJA Panel selection process suggests that such appointments should be made only in exceptional circumstances. Further, the attorney, who may or may not maintain an office in the district, should possess those qualifications that would be required for admission to the district's CJA Panel in the ordinary course of Panel selection.

- d. **Equal Opportunity.** All qualified attorneys shall be encouraged to participate in the furnishing of representation in CJA cases, without regard to race/ethnicity, gender, age, or disability.
- e. **Terms.** The term of membership on the CJA Panel is one year and shall run from February 1 through January 31. Members may apply for readmission in December of each year. Members who fail to reapply by December 31 shall be deemed to have resigned from the CJA Panel but may apply for new membership at any subsequent time.
- f. **Subpanel Designations.** Members of the CJA Panel shall be designated for placement on one of the following subpanels:
 - (1) **General.** Attorneys holding this designation would be appointed to misdemeanors, probation revocation and supervised release proceedings, trial witnesses (only if potential witness does not have prior or pending criminal case), and offenses which do not carry a potential sentence of greater than five (5) years.
 - (2) **Complex.** Attorneys holding this designation would be eligible to be appointed on all levels of offenses except those designated as major crimes.
 - (3) **Major Crimes.** Attorneys holding this designation would be eligible to be appointed on all levels of offenses, up to and including those designated as major on a list to be maintained by the clerk's office and updated, as necessary, by the Panel Selection Committee.

The Committee will recommend to the court which attorneys should serve on the General, Complex, or Major Crimes subpanels. As part of the December readmission application, a member may request a change in subpanel designation.

- g. Application.** Application forms for membership on the CJA Panel shall be made available, upon request, by the clerk of court. Completed applications, along with a statement of qualifications and experience and supporting material, shall be submitted to the clerk of court who will transmit the material to the Chair of the Panel Selection Committee.

B. Panel Selection Committee.

- 1. Membership.** The court shall establish a Panel Selection Committee consisting of three CJA Panel attorneys who agree to serve without compensation and the Federal Defender, or designee, who shall serve ex officio. A district judge, the magistrate judge, and the clerk of court, or the clerk's designee, shall be liaisons with the Committee.

Membership on the Committee shall be voted upon by the membership at the annual meeting to be held in October or November of each year. Membership shall be for a three-year term. If any Committee member resigns from the Committee, the position shall be filled for the remainder of the term by a person designated by the other two Committee members.

Any CJA Panel attorney is eligible for the Committee.

- 2. Duties.**

- a. The Committee shall be responsible for:

 - (1) annually evaluating applications for reappointment or change in subpanel designation and at least quarterly evaluating new applications for appointment, and for making recommendations to the court to ensure that applicants meet the criteria for inclusion in the CJA Panel;
 - (2) determining which CJA Panel members should be placed on the General, Complex, or Major Crimes subpanels;
 - (3) working with the Federal Defender to provide training programs for the CJA Panel attorneys and other members of the criminal defense bar;
 - (4) generally representing the interests of the CJA program in the district;

- (5) determining those training programs that qualify under VI.A.3.c. of this Plan; and
 - (6) receiving, reviewing, and making recommendations to the court concerning any comments or concerns regarding
 - (a) the performance of CJA Panel attorneys;
 - (b) the fairness or functioning of the CJA Panel appointment process; and
 - (c) the processing the CJA Panel payment vouchers.
- b. If, at any time during the course of a year, the number of vacancies due to resignation, removal, or death significantly decreases the size of the CJA Panel, the Committee shall solicit applications for the vacancies, convene a special meeting to review the qualifications of the applicants, and select prospective members for recommendation to the court for approval.
- c. When the Committee submits the names of applicants for CJA Panel membership to the court for approval at the beginning of the new panel year, the Committee shall furnish information to the court regarding recruitment efforts undertaken by the Committee in furtherance of the Equal Opportunity statement in Section VI.A.3.d. of this Plan. At the same time, the Committee shall provide the court with information on the CJA Panel of attorneys in each of the categories listed in Section VI.A.3.d.

C. Selection for Appointment.

1. Maintenance of CJA Panel and Distribution of Appointments.

The clerk of the court shall maintain an automated program which contains pertinent data for all attorneys included on the CJA Panel, with current office addresses and telephone numbers, and indication of their placement on either the General, Complex, or Major Crimes subpanels. The application and supporting material, noted by the Committee with the appropriate subpanel, shall be maintained in a separate file. The clerk shall also maintain a record of assignments to private counsel, and, when appropriate, statistical data reflecting the proration of appointments between attorneys from the Federal Defender office and private attorneys.

2. Method of Selection.

Counsel appointed from the list of private attorneys shall be selected by rotation, except when an attorney is not available by reason of another commitment, or, in the judgment of the court, the selection of other counsel

is desirable because the nature and complexity of the case requires the appointment of more experienced counsel. This procedure should result in a balanced distribution of appointments and compensation among the members of the CJA Panel and quality representation for each CJA defendant.

A defendant shall not have the right to the appointment of any particular counsel but may state any objection to counsel whose appointment is under consideration.

Upon the determination of a need for the appointment of counsel, the judge or magistrate judge shall notify the clerk of court.

VII. REPRESENTATION IN CAPITAL CASES

[RESERVED]

VIII. DUTIES OF APPOINTED COUNSEL

- A. Standards.** The services rendered by appointed counsel shall be commensurate with those rendered if counsel were privately employed.
- B. Professional Conduct.** Attorneys appointed pursuant to the CJA shall conform to the highest standards of professional conduct, including but not limited to the provisions of the Rules of Professional Conduct as adopted by the New Hampshire Supreme Court. *See* LR 83.5.
- C. No Receipt of Other Payment.** Appointed counsel may not require, request, or accept any payment or promise of payment or any other valuable consideration for representation under the appointment unless such payment is approved by order of the court.
- D. Continuing Representation.** Once counsel is appointed under the CJA, counsel shall continue the representation until the matter, including appeals or review by certiorari, is closed; until substitute counsel has filed a notice of appearance; until an order has been entered allowing or requiring the person represented to proceed *pro se*; or until the appointment is terminated by court order.

In the event that a defendant is convicted following trial, counsel shall advise the defendant of the right of appeal and of the right to counsel on appeal. If requested to do so by the defendant, counsel shall file a timely notice of appeal and shall continue to represent the defendant unless, or until, relieved by this court or by the court of appeals.

IX. DUTIES OF LAW ENFORCEMENT AND RELATED AGENCIES

- A. Presentation of Accused for Appointment of Counsel.** Probation officers and pretrial services officers in this district, and those acting on their behalf, shall promptly ask any person who is in custody, or who otherwise may be entitled to counsel under the CJA, whether that person is financially able to secure representation, and shall, in such cases in which the person is not, arrange for a prompt appearance before a magistrate judge or judge of this court for determination of financial eligibility and appointment of counsel.
- B. Pretrial Services Interview.** As part of their usual procedures, pretrial services officers shall advise any person of the right to speak to an attorney before answering any questions and that the court will appoint an attorney if that person is without resources. The contents of PSA 1, Advice of Rights Form, shall be explained to the person, who shall then be asked to read and sign it. If counsel is requested to be present at the interview, it shall be deferred until counsel is available.

X. SERVICES OTHER THAN COUNSEL

- A. Authorization.** Counsel for any person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an *ex parte* application. Upon finding that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services.

The CJA authorizes the obtaining of investigative, expert, or other services without prior authorization but subject to subsequent review, providing the cost of the services obtained does not exceed \$300 plus expenses reasonably incurred. This limit may be waived if the court finds that timely procurement of necessary services could not await prior authorization.

- B. Change in Eligibility.** If at any time after counsel has been authorized to obtain investigative, expert, or other necessary services for a defendant, the court finds that the defendant is financially able to obtain such services or to make partial payment therefor, the court may terminate the authorization of such services or authorize or direct payment, in an amount fixed by the court, to the clerk of court as provided in

the CJA, as the interests of justice may dictate. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for assisting in the representation of a defendant.

- C. **Applicability.** The provisions of this section do not apply to the Federal Defender Organization operating under this Plan.

XI. COMPENSATION

- A. **Rates.** The maximum rates and amounts of compensation for attorneys who represent indigent criminal defendants and for the provision of services other than counsel shall be in accordance with prevailing rates and amounts as set by the CJA.

The hourly rates and amounts of compensation are intended to be maximum rates and will be treated as such. In fixing the compensation, the court will consider the qualifications of attorneys and the relative difficulties encountered in presenting the case. The court shall also bear in mind the underlying philosophy of the CJA that the bar of the nation owes a responsibility to represent persons financially unable to retain counsel and that the compensation provided is not intended to equate private counsel fees. In keeping with that philosophy, payment in excess of the statutory maximum shall only be sought in complex or extended cases.

- B. **Excess.** Payment in excess of limits may be made for extended or complex representation when supported by a motion from counsel requesting approval of the excess amount and stating the reasons why such excess amount is justified, and when the court certifies that such payment is necessary to provide fair compensation to counsel or for services of an unusual character or duration, and the amount of the excess payment is approved by the Chief Judge of the Court of Appeals for the First Circuit.
- C. **Claims.** Claims for compensation for representation provided under the CJA shall be promptly submitted, on the appropriate CJA form, to the office of the clerk of the court. That office shall review the claim form for mathematical and technical accuracy and for conformity with the CJA Guidelines and, if correct, shall forward the claim form for the consideration of the appropriate judge or magistrate judge.
- D. **Payment.** The court will exert its best effort to avoid delays in reviewing payment vouchers and in submitting them for further processing.

Upon approval by the court, all vouchers and claims for compensation and reimbursement of expenses shall be entered into the CJA Panel Attorney Payment System for payment by the Administrative Office of the United States Courts (AO). The originals of the voucher forms are retained in this district for audit purposes.

- E. Public Disclosure.** The amounts paid for representation and for expert, investigative, and other services under this Plan shall be made available to the public no later than the conclusion of all proceedings.

XII. FORMS

Standard forms, pertaining to the CJA and approved by the Judicial Conference of the United States or its Committee on Defender Services and prescribed and distributed by the Director of the AO, shall be used, where applicable, in all proceedings under this Plan.

XIII. EFFECTIVE DATE

This Plan shall become effective February 1, 2003.

ENTERED FOR THE COURT ON NOVEMBER 21, 2002.

Paul Barbadoro
Chief Judge

APPROVED by the Judicial Council of the Circuit on _____

Michael Boudin
Chief Judge
First Circuit Court of Appeals